UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID B. GRECU,

Petitioner,

v.

M.S. EVANS, WARDEN,

Respondent.

_____/

No. C-07-0780 EMC

ORDER DENYING PETITION FOR HABEAS CORPUS

I. INTRODUCTION

Pending before the Court is Petitioner David B. Grecu's petition for habeas corpus. Petitioner asserts that he is entitled to habeas relief based on ineffective assistance of counsel, alleged prosecutorial misconduct, and the involuntariness of his plea agreement underlying his state court conviction. For the following reasons, the petition is **DENIED**.

II. FACTUAL & PROCEDURAL BACKGROUND

On July 21, 1991, Petitioner David Grecu was arrested for possession of cocaine in violation of Health & Safety Code § 11350. Petition for Habeas Corpus ("Petition") at 1. In an attempt to avoid prosecution, Petitioner began to make controlled drug purchases from drug dealers in Santa Cruz County on behalf of the Santa Cruz Narcotics Unit. *Id.* at 2. In September 1991, the Santa Clara Police traced a gun stolen during a home robbery to Petitioner, and arrested him on a robbery charge. *Id.*; *see also* Petition, Ex. I, at 34.

Petitioner eventually retained attorney David Kraft to represent him. In November 1991, Petitioner began cooperating with the authorities. He confessed to his involvement in dozens of

robberies carried out by the David Ianniciello Crime Family, identified other perpetrators, drove with law enforcement to locate clothing and masks worn during the robbery, and provided information to the authorities regarding other residential robberies and auto thefts that occurred in Santa Clara, Monterey, Sacramento, and Santa Cruz Counties. *Id.* at 36. Eventually, Petitioner pled guilty on November 20, 1991, to one count of receiving stolen property in violation of Cal. Penal Code § 496, and one additional count. *Id.* at 35. In exchange for the guilty plea, Petitioner received no state prison commitment for his role in the underlying robbery. *Id.* Ultimately, the Santa Clara County assistant district attorney provided Petitioner with the following agreement, dated December 9, 1991:

> Based upon the information furnished by the Defendant as part of the disposition in the above entitled case and the continuing cooperation of the defendant, the Office of the District Attorney of Santa Clara County agrees it will not prosecute said defendant for any theft crimes such as auto theft, burglary and robbery, committed in Santa Clara County prior to the date of defendant's plea of guilty.

Petition, Ex. H, at 2.

On November 22, 1991, Petitioner contends that the Santa Clara County law enforcement entities with whom he had been cooperating contacted the Santa Cruz County Sheriff's Office because many of the crimes Petitioner had been describing occurred in Santa Cruz. Declaration of David Grecu ("Grecu Decl.") ¶ 11 (Docket No. 1). That day, a Santa Cruz Sheriff's Deputy accompanied Petitioner and Santa Clara authorities during a drive in which Petitioner identified various scenes of crimes that occurred in Santa Cruz County. *Id.*; *see also* Petition, Ex. I, at 21-22. Petitioner claims that one of the crimes he identified during this drive was the residential burglary of the residence of a Mr. Bothwell. Petition, Grecu Decl. ¶ 11. Petitioner further states in his declaration that he was told by the officials that he would not be prosecuted by Santa Cruz authorities for his statements. *Id.* ¶ 10. The Santa Cruz County Sheriff's Officer who participated in this drive states that Petitioner was told that the agreement he had with Santa Clara County "was not binding with the Santa Cruz Sheriff's Office and that anything he told to us would be in the form of a proffer" but that "anything he told us about . . . or alluded to that day would not be used against him because he was represented by an attorney." Petition, Ex. I, at 22.

On November 25, 1991, Petitioner claims that he entered into a "verbal" immunity agreement that was recorded and that he began recounting all the crimes he had pointed out during the November 22 drive. Petition, Grecu Decl. ¶ 12, 15. This agreement was apparently made in the presence of Petitioner's attorney, David Kraft, Ms. Christine McGuire (a Santa Cruz County assistant district attorney), a representative from the Santa Clara County district attorney's office, and law enforcement personnel. *Id.* ¶ 12. Petitioner never clearly articulates the terms of this alleged immunity agreement and asserts that he was told that the tapes and transcripts of this agreement no longer exist. *Id.* ¶ 15. Nor does he describe what the Santa Cruz district attorney promised, if anything, with regard to immunity. On November 25, after entering into the alleged agreement, Petitioner claims that he spent "hours reciting all of the cases [he] had previously disclosed to Santa Cruz investigators on November 22, 1991." *Id.*

On December 5, 1991, Petitioner's attorney, Mr. Kraft, met with Ms. McGuire and law enforcement personnel from Monterey and Santa Cruz Counties. Ms. McGuire noted that Santa Cruz County had no deal with Mr. Grecu and could not evaluate whether it was willing to enter into an agreement until it had a "complete statement from him." Petition, Ex. B, at 2. She also indicated, however, that it was not their intent to use any statement by Petitioner against him. *Id.* Mike Brasffield, a Monterey County Sheriff's Deputy, likewise stated that "[n]o offer can be made without knowing the particular crimes and his participation in them." *Id.* At this meeting, Mr. Kraft, Petitioner's attorney, then indicated that he could no longer represent Petitioner. Specifically, he indicated to all present that:

> I've got a conflict. And, I can no, no longer represent Mr. Grecu. Ah, and it's a conflict that, ah, I just realized this morning. And, it's a, a, a, a, a conflict to the degree that I can't possibly, in my mind at this point, represent him. And so, I'll have to contact the State Bar Ethics Committee and find out what my alternatives are. Now, as I see it right now, my only alternative is to file a motion to have myself relieved . . . .

Id. at 3. Someone (the transcript does not indicate who stated this) described the conflict as follows:

> Um. It's. It appears that one of the named co-conspirators in two or more of the robberies that he's talked about is the person that paid his fee. And, ah, me personally, I don't see how we can proceed under those circumstances, to represent Grecu. And, especially in light of what we might get, and in future interviews. And, Grecu didn't tell

> David [Kraft]. And, the lawyer that was the intermediary didn't tell David [Kraft]. And it was only once Ted [Keech, Santa Clara Police Department] and I talked, and then I talked to Dave [Kraft] and he rechecked this morning, that it, that this became known to him.

Id. at 4. Petitioner alleges that the Santa Cruz County prosecutor threatened to file a complaint against Mr. Kraft with the State Bar Association over this conflict unless Mr. Kraft withdrew from representing Petitioner. Petition, Grecu Decl. ¶ 18. He further claims that investigators had shown Mr. Kraft pictures of murder victims killed by Petitioner's co-defendants. *Id.* Finally, Petitioner asserts that he was never advised of the conflict or given the opportunity to waive it. *Id.*

In the wake of Mr. Kraft withdrawing as Petitioner's attorney, Ms. Lindy Hayes, a public defender from Santa Clara County who had previously represented Petitioner, was brought in to represent Petitioner again. Petition, Ex. Q, at 2. On December 9, 1991, Petitioner, with Ms. Hayes present, began recounting to Santa Cruz law enforcement and district attorney personnel a number of crimes he either participated in or knew about. *See generally* Petition, Ex. B. The morning of this meeting, Ms. McGuire, the assistant district attorney with Santa Cruz County, recorded the following agreement she had made with Ms. Hayes:

> I have conferred with Mr. Grecu's counsel. It is my understanding that Mr. Grecu will give what is known as a proffer to the detectives, with respects [sic] to crimes committed to the [sic] Santa Cruz County by Mr. Grecu or crimes committed in Santa Cruz County that Mr. Grecu has knowledge of. It is my understanding that Mr. Grecu will make a statement to the detectives with respect to those crimes. That the statement is for the purpose of examining it for its truthfulness and its [sic] for the purpose of evaluating Mr. Grecu with respect for his credibility. It is not the intention of the Santa Cruz District Attorney's [sic] to use this statement against Mr. Grecu or the fruits of this statement against Mr. Grecu. It is only for the purpose of evaluating the truthfulness of the statement and for evaluating Mr. Grecu's credibility at this time. We, at this time, acknowledge that there are no deals with Mr. Grecu with respect to any crimes that he may have committed in Santa Cruz County. It should be understood that this agreement, with respect to giving the proffer, does not preclude Mr. Grecu from being prosecuted for any crimes committed in Santa Cruz County. However, the understanding that the District Attorney's Office can not use the proffer as the basis of the prosecution. Mr. Grecu, it should be understood, can be prosecuted based on other evidence independent of the proffer, however.

Petition, Ex. L, at 2. The "use immunity" nature of this agreement was further described by Petitioner's attorney later that day during the immunity proffer with law enforcement:

> [Lindy Hayes]: Basically, the immunity agreement covers crimes of a similar nature, to wit, theft-related crimes.
>
> [David Grecu]: Okay. We're talking about Santa Cruz County, though. You said you didn't have anything in writing.
>
> [Lindy Hayes]: Yeah. But, what the immunity agreement is from Santa Cruz County is, it's not as far-reaching as the one from Santa Clara. But, it's on tape. Basically, whatever they . . .
>
> [David Grecu]: Yes.
>
> [Lindy Hayes]: . . . Find out from you today cannot be used against you.

Petition, Ex. B, at 17. The full text of this immunity proffer is not in the record. According to the page numbers, the full transcript runs 392 pages. The only excerpts of the interview contained in the record are the 23 pages attached as Exhibit B to the Petition.

On January 3, 1992, a criminal complaint was filed in Santa Cruz County against Petitioner. Petition, Ex. N (Docket No. 1-15). This complaint charged Petitioner with possession of cocaine in violation of Health & Safety Code § 11350 based on Petitioner's July 21, 1991 arrest. *Id.* On February 3, 1992, a First Amended Criminal Complaint was filed against Petitioner. Petition, Ex. D. In addition to the cocaine possession charge, Petitioner was charged with six counts of residential burglary in violation of Cal. Penal Code § 459. *Id.*. Significant for purposes of Petitioner's arguments in this action, Count 2 of the First Amended Criminal Complaint related to the October 13, 1989 robbery of the residence of Gordon Bothwell in Santa Cruz. *Id.* Ms. Hayes describes the process by which these new charges came about as follows:

> I found out that David had made a mistake, that he had failed in his effort to take a complete immunity bath as the Santa Cruz authorities had proof on two separate cases that he had failed to tell them about, and that they could send him to prison on those but they would like to make a deal with him because they needed his testimony in order to prosecute the other gang members. I was upset, since I felt this was a little outside the spirit of the agreement as David had talked about the major crimes and the two crimes paled in comparison, but I recognized that they had him cornered and that David was frantic about not going to prison. David Grecu and I decided to deal.

Petition, Ex. Q, at 3 (Docket No. 1-18). Petitioner's account of what transpired differs greatly. Petitioner asserts that he informed Ms. Hayes that he would not plead guilty because he had

"complete immunity under the agreement" and that Ms. Hayes then became "angry and stormed out of the room." Petition, Grecu Decl. ¶ 35. She further told him that he had to "cooperate and . . . go along with the new 'deal', because if [he] didn't, [he] would end up in prison with [his] co-defendants." *Id.* He also claims that she told him that the "prosecutor could put [him] in prison for fourty [sic] years, and that they could do anything they wanted with me because I had given the investigators such detailed information" and that they did "not have to honor any immunity agreement negotiated by [his] former attorney." *Id.* ¶ 34.

That same day, Petitioner, Ms. Hayes, and Ms. McGuire (the Santa Cruz County assistant district attorney) negotiated a plea agreement. This plea agreement called for Petitioner to plead guilty to the seven counts in the amended complaint in exchange for a 10 year prisoner term, to be suspended "provided Mr. Grecu successfully completes five years probation, one year in jail to be served in full." Petition, Ex. L, at 3 (Docket No. 1-13). He further agreed to testify at hearings, trials, or grand jury proceedings about the involvement of a number of individuals in various burglaries between 1989 and 1991. *Id.* at 2-3. It further provided that nothing Petitioner testified to in these hearings could be used against him in any proceeding. The agreement further referenced the prior December 9, 1991 immunity agreement made with Santa Cruz officials as follows:

> I. The District Attorney's office has previously granted use immunity to Mr. Grecu for statements made to Sgt. Bradley in the process of investigating these crimes as follows: Statements by Mr. Grecu, and the fruits of those statements, may not be used to prosecute him, so long as those statements are truthful and relate to robberies (including any gun enhancements) or crimes of a lesser nature; crimes of a greater degree are not covered. Crimes which may be proved by independent means are also not covered.

Id. at 6. Finally, the agreement specified that if Petitioner failed to testify or testified untruthfully:

> then this agreement is rescinded, Mr. Grecu's guilty plea as described in paragraph D is deemed withdrawn and Mr. Grecu can be prosecuted or subjected to any penalty for Count 1 and Count 2 as set forth on the Amended Complaint [the cocaine possession and Bothwell burglary counts] . . . in the same manner and to the same extent as he would be prosecuted or subjected to but for this agreement. The plea of guilty of Counts 3 through 7 may not be used as independent evidence to prosecute Mr. Grecu.

Id. ¶ E.

On the evening of February 3, Ms. Hayes, Ms. McGuire, and Petitioner appeared before the Superior Court for the County of Santa Cruz. Ms. Hayes indicated that even though she was a public defender in Santa Clara County, she was representing Petitioner as a "concession from [her] county to help out, since [she] represented Mr. Grecu over there and because Mr. Grecu wanted me to represent him." Petition, Ex. A, at 4 (Docket No. 1-2). Ms. Hayes indicated that the parties had reached an agreement and requested that the court accept it. *Id.*

The court expressed confusion regarding the effect of any non-compliance by Petitioner, insofar as the applicable paragraph in the agreement (quoted above) drew an apparent distinction between Counts 1 and 2 and 3 through 7. That led to the following exchange:

> THE COURT: All right. Paragraph E is not as straightforward as sometimes – I take it that Mr. Grecu's exposure, and correct me if I'm wrong, if – if it is determined that he has perjured himself in – in any of his testimony as to any of the incidents enumerated in Paragraph D, his only exposure is to Counts 1 and 2 of the amended complaint.
>
> MS. HAYES: That's right, Your Honor.
>
> THE COURT: So – I am not suggesting this is going to happen. If it should be determined that he's perjured himself a number of times, he still will have the benefit of this agreement as it relates to Counts 3 through 7?
>
> MS. HAYES: No, Your Honor. He has complete immunity right now as to Counts 3 through 7. In order to reach that agreement he had to surrender some of that immunity. That was the agreement we've made.

Id. at 8. The court then confirmed from the parties that Petitioner was going to plead guilty as to all seven counts. Ms. McGuire then provided the following statement in an attempt to explain the relationship between the prior "use immunity" agreement and the current plea agreement:

> MS. McGUIRE: And by way of – of explanation, so that it is clear, Mr. Grecu gave a proffer to law enforcement and was granted use immunity with respect to that proffer for the purposes of evaluating him with respect to his credibility and corroboration of that information.
>
> Separate and apart from those statements, law enforcement was able to make Mr. Grecu with respect to two crimes independent of that proffer and that's – those are reflected in Counts 1 and 2. The balance of those counts [counts 3 through 7], the prosecution cannot make against Mr. Grecu, but as part of this plea negotiation, he is willing to

> surrender part of that use immunity and enter pleas to the remaining counts.

Id. at 8. Thus, because law enforcement could not tie Petitioner to Counts 3 through 7 independent of his statement, they were unable to prosecute him for them unless he pleaded guilty. Petitioner agreed to do so as to avoid prison time for Counts 1 and 2 which were not covered by the use immunity. *See id.* at 9-10. After advising Petitioner of his rights and ensuring that his plea was voluntary, Petitioner pleaded guilty to each Count in the First Amended Complaint. *See id.* at 15.

On March 3, 1992, Petitioner decided to refuse to cooperate as required under the plea agreement and sought to withdraw his guilty pleas. Petition, Ex. E, at 2 (Docket No. 1-6) ("Ms. Hayes advises the Court that the defendant is now refusing to testify in the matters set forth in the 'Agreement' of 2-3-92 and requests that the plea be withdrawn."). Petitioner is unclear as to what caused him to decline to participate in the plea agreement between February 3, 1992 and March 3, 1992. In his declaration, Petitioner suggests it is because his immunity agreement was "broken" because he had "worked off" the drug possession charge (Count 1) and that the Bothwell burglary (Count 2) was included in his immunity proffer. Petition, Grecu Decl. ¶ 38, 41. The Superior Court granted the motion to withdraw the plea. Petition, Ex. E, at 2..

On March 30, 1992, Petitioner again decided to accept the agreement and sought to plead guilty pursuant to the agreement. *See generally* Exhibits Lodged in Support of Answer ("Lodged Exhibits"), Ex. 2. In his declaration, petitioner suggests this was motivated, in part, by encounters he had with various co-defendants (including David Ianniciello) who threatened his life should he be sent to prison. Petition, Grecu Decl. ¶ 44. On the morning of March 30, the Superior Court began a plea colloquy with Petitioner. Petitioner stated he understood his obligations under the plea agreement and that he understood he was giving up his right to trial. Lodged Exhibits, Ex. 2, at 11-12. Petitioner asked the court about the possibility of the first degree robbery charges being reduced to second degree robbery at the end of his term of probation, but the Court informed him that Petitioner would have to make a motion for such relief and there was no guarantee it would be granted. *Id.* at 12-13. Ultimately, the court refused to accept the plea when a dispute arose over

whether Petitioner was required to pay restitution. *Id.* at 19-21. The Court found the parties had not reached a full agreement because of this dispute. *Id.* at 22-23.

After having further time to consult with Ms. Hayes regarding the question of restitution, Petitioner agreed to plead guilty. *Id* at 24. Petitioner returned before the Superior Court and stated that he had "no more questions" regarding the plea agreement and that it had all been explained to him. *Id.* After referring to the plea agreement, the court asked petitioner if there had been "any other promises or threats to cause [him] to enter" the plea. *Id.* at 26. The Petitioner replied there was not and that his plea was free and voluntary. *Id.* Petitioner proceeded to plead guilty to each charged in the amended complaint *Id.* at 27-29. Accordingly, Petitioner was sentenced to prison for 10 years, but the sentence was suspended with petitioner being sentenced to one year in the county jail and then granted probation for five years. Lodged Exhibits, Ex. 1, at 5.

Plaintiff's probation was subsequently revoked on November 30, 1994. *Id.* at 9. Petitioner was again represented by Lindy Hayes at this proceeding. *Id.* On February 21, 1995, Petitioner's probation was reinstated. *Id.* at 11. On December 14, 1995, his probation was again revoked, apparently for failure to pay restitution as required. *Id.* at 12; 14. Petition was again represented by Ms. Hayes at this proceeding. *Id.* at 14. Petitioner admitted the violation and his probation was reinstated. *Id.*

In late 1996, Petitioner was arrested, and eventually convicted, for second degree burglary and grand theft in Napa County. *Id.* at 46-49. On June 13, 1997, the probation for his Santa Cruz County conviction was revoked for the third time with Petitioner being sentenced to his suspended 10 year prison term, to run consecutively with the indeterminate life sentence resulting from his Napa conviction. *Id.* at 19, 22-23, 25.[1] Petitioner was again represented by Ms. Hayes at this proceeding. *Id.* at 22. Petitioner appealed his parole revocation to the California Court of Appeals. *Id.* at 27. The Court of Appeal affirmed the conviction on July 21, 1998 in an unpublished opinion.

[1] Petitioner was sentenced to an indeterminate life sentence under California's three-strikes law. The "prior strikes" for purpose of this sentence were the burglary counts to which Petitioner pleaded guilty in Santa Cruz County on March 30, 1992. Petition, Ex. W, at 3-6.

Ex. 5 to Respondent's Answer to OSC, at 4. Petitioner did not appeal to the California Supreme Court. *Id.*

Petitioner then filed a petition for writ of habeas corpus in the California Superior Court for the County of Santa Cruz on August 23, 1999. Petition for Habeas Corpus ("Petition") at 24, ¶ 54 (Docket No. 1); Petition, Ex. U. The Superior Court issued an order to show cause as to Counts 3 and 4 raised in Petitioner's petition. Petition, Ex. U. In Count 3, Petitioner alleged that Ms. Hayes rendered ineffective assistance of counsel when she failed to file a motion to dismiss in the initial robbery and cocaine charges in 1992 as the prosecutor had "charged [him] with crimes covered by the immunity agreement." Exhibits in Support of Answer, Ex. 6, at 5. In Count 4, Petitioner alleged that his guilty pleas were involuntary because he "pled guilty only on the advice of my attorney and she falsely or mistakenly told me my immunity agreement was worthless and could not prevent the prosecution of the charges." *Id.* at 6.[2]

On September 2, 2005, the Superior Court denied the petition for habeas corpus. Petition, Ex. T (Docket No. 1-21). The court ultimately concluded that petitioner's counsel was "reasonably effective." *Id.* at 12. It stated:

> The petitioner appeared to have been aware of the fact that the Bothwell burglary may not have been covered in the use agreement, as referred to, and he – at the time of entry of plea, the minutes reflect that he refused to accept the negotiated plea agreement on the morning of March 30th of 1992, and the matter was continued to later in the day, for petitioner to have additional time to consider the disposition and confer with his attorney.

Id. at 12-13. It then asserted that "[i]t is obvious from the record that the decision to enter plea or not was a thoughtful decision – or a thoughtful one, based on a tactical decision to avoid a state prison commitment." *Id.* at 13. It then found that he had failed to show prejudice as to the presence of the Bothwell robbery in the plea agreement because he "would still have been sentenced to state prison on the other counts, with two of the first-degree burglaries having been sentenced to run

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[2] The other two counts of the Petition alleged: (1) That David Kraft provided ineffective assistance by withdrawing based on a conflict without counseling him regarding the conflict and giving him an opportunity to waive said conflict (Count 1); and (2) That Christine McGuire "interfered with [his] Sixth Amendment right to counsel by forcing David Kraft . . . to withdraw." *Id.*

concurrent with the remaining sentence." *Id.* Finally, the court noted that under the case of *In re Clark*, 5 Cal. 4th 750 (1993), Petitioner had a responsibility to act within a "reasonable period of time" to assert his claim. *Id.* at 13. It concluded that Petitioner had waited an unreasonable period of time, in that he could have raised the ineffective assistance claim in his direct appeal from the imposition of the consecutive 10 year sentence but did not do so. Quoting *Clark*, the court stated that "'in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not raised upon a timely appeal from a judgment of conviction.'" *Id.* at 14 (quoting *In re Clark*, 5 Cal. 4th at 765).

Petitioner subsequently petitioned for a writ of habeas corpus before the California Court of Appeal and the California Supreme Court, both of which were denied, on April 14, 2006 and January 17, 2007, respectively, without the courts providing reasoning. *See* Lodged Exhibits, Ex. 12; Petition, Ex. Z.

III. STANDARD OF REVIEW

The district court may entertain a petition for a writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Under the "unreasonable application" prong, a federal habeas court may only grant the writ if the state court identified the correct legal principle and standard from the Supreme Court' decisions, but "unreasonably applie[d] that principle to the

facts of the prisoner's case." *Id.* at 409; *see also DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009) ("The state court unreasonably applies clearly established federal law if it 'either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.'" (quoting *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002)).

That a state court may have erroneously applied federal law does not render the state court's decision unreasonable. Rather, the state court' must have been "objectively unreasonable" – an extremely high standard that "precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." *Henry v. Ryan*, 720 F.3d 1072 (9th Cir. 2013) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 7861)). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Where there is no reasoned opinion by a state court on a given claim, "the habeas petitioner must still show there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S. Ct. at 784. In such cases, the court must determine "what arguments or theories . . . could have supported[] the state court's decision" before asking whether "it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 786; *see also Dove v. Ryan*, 500 F. App'x 571, 572 (9th Cir. 2012) (same).

IV. DISCUSSION

Petitioner has raised 4 claims in his petition for habeas corpus. The Court will address each in turn.

A. Petitioner's First Claim, Alleging Ineffective Assistance of Counsel Against His First Attorney, Is Barred by Petitioner's Subsequent Guilty Plea

Petitioner argues that his first attorney, David Kraft, provided ineffective assistance of counsel by withdrawing from his criminal case "based on an alleged conflict of interest without counseling me about the possible conflict and without giving me any opportunity to waive the

conflict." Petition at 6. In support of this claim, Petitioner alleges that Mr. Kraft informed him that the prosecutor, Ms. McGuire, "forced him to resign." *Id.* Petitioner asserts in his declaration that Mr. Kraft told him that Ms. McGuire told him "that she would file a complaint against him unless he withdrew from representing" him. Petition, Grecu Decl. ¶ 18. Petitioner then alleges that Mr. Kraft "walk[ed] out" on him after he had negotiated an immunity agreement on behalf of Petitioner. *Id.* He asserts that if he had been aware of the potential conflict, he would have waived that conflict "and chosen to continue with David Kraft as my lawyer." *Id.* The California Superior Court rejected this claim without issuing an order to show cause or providing its reasoning.

Petitioner's claim fails on federal habeas review because it is barred by his subsequent guilty plea. The Ninth Circuit has noted:

> As a general rule, one who voluntarily and intelligently pleads guilty to a criminal charge may not subsequently seek federal habeas corpus relief on the basis of pre-plea constitutional violations. A defendant may only attack the "voluntary and intelligent character of the guilty plea," by showing that the advice he received from counsel was not "within the range of competence demanded of attorneys in criminal cases."

Hudson v. Moran, 760 F.2d 1027, 1029-30 (9th Cir. 1985) (quoting first *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), and then *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The rationale behind this rule is that a "'guilty plea represents a break in the chain of events which has preceded it in the criminal process.'" *Hurlow v. United States*, 726 F.3d 958, 966 (9th Cir. 2013) (quoting *Tollett*, 411 U.S. at 267). Even where a petitioner raises an ineffective assistance claim, the petitioner must allege "that he entered the plea agreement based on advice of counsel that fell below constitutional standards. In other words, he must allege that the plea agreement was 'the product of ineffective assistance of counsel,' or 'tainted by ineffective assistance of counsel.'" *Id.* (quoting first *United States v. Jemison*, 237 F.3d 911, 916 n.8 (7th Cir. 2001), and then *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995)).

Petitioner has alleged no facts, either in his declaration or in his petition, which suggest that his guilty plea was the product of, or tainted by, Mr. Kraft's alleged ineffective assistance. As stated above, the sole basis of Petitioner's first claim is that Mr. Kraft acted ineffectively by withdrawing without providing Petitioner with the ability to waive the apparent conflict. However, even if it is

assumed that the way Mr. Kraft withdrew fell below constitutional standards, the nature of this constitutional violation does not relate to any advice Mr. Kraft gave Petitioner relating to a subsequent plea agreement or Petitioner's subsequent decision to plead guilty. Stated another way, there are no allegations or arguments by Petitioner that he "entered the plea agreement based on advice of [Mr. Kraft] that fell below constitutional standards." *Id.*; *see also Fairbank v. Ayers*, 650 F.3d 1243, 1254 (9th Cir. 2011) (noting, under *Tollett*, that a petitioner's *Strickland* claim is "limited to the contention that trial counsel was ineffectively only in advising petitioner to plead guilty"); *Moran v. Godinez*, 57 F.3d 690, 700 (9th Cir. 1994), *superseded by statute on other grounds as stated in McMurtrey v. Ryan*, 539 F.3d 1112, 1119 (9th Cir. 2008) (holding that a petitioner who pleaded guilty could not raise an ineffective assistance claim based on his prior attorney's alleged failure to prevent the use of his confession). Accordingly, Petitioner is barred by his subsequent guilty plea from asserting this claim.

Petitioner's claim also fails on the merits as the state court could have reasonably concluded that Petitioner had failed to demonstrate actionable ineffective assistance on the part of Mr. Kraft. Ineffective assistance of counsel claims are governed by the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this standard, counsel is constitutionally deficient if its representation "fell below an objective standard of reasonableness" such that it was outside "the range of competence demanded of attorneys in criminal cases." *Gulbrandson v. Ryan*, 738 F.3d 976, 988 (quoting *Strickland*, 466 U.S. at 687-88). This is a highly deferential standard, and courts must "guard against the temptation 'to second-guess counsel's assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). Further, even where counsel provided objectively unreasonable assistance, a petitioner must show prejudice – that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). Given the deference courts must give to counsel's decisions under the *Strickland* test as well as the stringent standard of review afforded state court decisions under AEDPA, petitioner asserting ineffective assistance claims on federal habeas review have a tremendous burden of proving an entitlement to relief. *See, e.g.*, *Cheney v. Washington*, 614 F.3d 987 (9th Cir. 2010) (noting the

Supreme Court's command that ineffective assistance claims under AEDPA are subject to a "doubly deferential" judicial review).

Here, the state court could have reasonably concluded that Petitioner did not suffer any prejudice as a result of Mr. Kraft's alleged ineffective assistance of counsel. As discussed above, Mr. Kraft was, apparently, being paid to represent Petitioner by David and Robert Ianniciello – two individuals against whom Petitioner was providing extensive information to law enforcement and who allegedly orchestrated the criminal conspiracy of which Petitioner was a part. Petition, Grecu Decl. ¶¶ 18-19. Mr. Kraft notified the prosecutors of his conflict on the morning of December 5, 1991. Petition, Ex. B, at 2. Petitioner then retained Ms. Hayes no later than December 9, 1991. Petition, Grecu Decl. ¶ 23, 24.

Petitioner's only argument as to prejudice is that "[h]ad he been advise[d] about a potential conflict I would have waive[d] that conflict and chosen to continue with David Kraft as my lawyer. He had my full faith and trust." Petition at 6. This is insufficient to show prejudice. First, it is not at all apparent that had Petitioner waived the conflict, Mr. Kraft would have remained his attorney. Mr. Kraft in the December 5, 1991 transcript expressed a concern for his safety having discovered the identity of the parties paying his fees:

> TF[]: Mr. Kraft, do you feel that you have an obligation to tell this other person [who was paying his fee] what's going on?
>
> DK: Ah, no. I do not have an obligation. I have no intentions of doing that. Number one, ah, I have some concern for my own safety.
>
> TF: I understand.
>
> DK: These people are, are, from what I have gathered, are not people to have any association with. And, I don't intend to have any contact with them, whatsoever. On any degree.

Petition, Ex. B, at 5. Petitioner recognizes that Mr. Kraft was motivated in withdrawing, at least in part, because of a concern for his own safety. *See* Petitioner, Grecu Decl. ¶ 20 ("Petitioner alleges that Mr. Kraft's desire to have himself relieved as my counsel had more to do with his (reasonable) fear of my codefendants than any legitimate conflict . . . .").

In these circumstances, Petitioner's willingness to waive the conflict would not have eliminated the issue. As the Supreme Court in *Wheat v. United States*, 486 U.S. 153 (1988), recognized, while the Sixth Amendment guarantees a defendant to competent counsel, it does not "ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 159. In that case, a habeas petitioner had sought permission from the trial court to substitute in as counsel the attorney who was representing his co-defendants. Despite the petitioner waiving the apparent conflict, the trial court denied the substitution motion. The Supreme Court found no Sixth Amendment violation, stating:

> Petitioner insists that the provision of waivers by all affected defendants cures any problems created by the multiple representation. But no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. . . . Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

Id. at 160. The Ninth Circuit has expressed similar concerns in cases where third-parties fund a defendant's defense in cases involving large conspiracies. In *Quintero v. United States*, 33 F.3d 1133 (9th Cir. 1994), the Ninth Circuit recognized that there are

> "inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest."

Id. at 1135 (quoting *Wood v. Georgia*, 450 U.S. 261, 268-69 (1981)). Given Mr. Kraft's apparent desire to withdraw, his fear for his safety, and the nature of the conflict at issue, it appears likely that even had Petitioner been willing to waive any conflict, Mr. Kraft would have withdrawn as counsel.

Finally, the state court could reasonably have concluded that Petitioner suffered no prejudice as he was represented by counsel throughout the Santa Cruz proceedings. Though Petitioner alleges Mr. Kraft's withdrawal left him "without counsel," there are no allegations in the petition or in his declaration that suggests the absence of counsel during the four-day period (between December 5

and December 9) prejudiced him in any way. The only statement in his declaration regarding these four days states:

> I was now without counsel. The next day, the Santa Clara police lead investigator Sergeant Ted Keech and Detective Richard Rodriguez contacted me and said that they could arrange for new counsel to represent me in Santa Cruz and Santa Clara counties. They suggested Lindy Hayes, the Santa Clara County public defender who had briefly represented me at my initial arraignment in Santa Clara County. I was reluctant to agree based on my prior contacts with Ms. Hayes. Sgt. Keech and Det. Rodriguez convinced me to accept Lindy Hayes by telling me that she had been thoroughly briefed about my immunity agreement and the arrangements made with both counties' authorities. I felt that I had little choice, and that having any attorney was better than going forward with none. I reluctantly agreed to be represented by Lindy Hayes.

Id. ¶ 22. Petitioner was subsequently represented by Ms. Hayes during his immunity proffer and at subsequent court proceedings. Petitioner failed to show that had the conflict been waived and Kraft stayed on, he would not have taken the same course of action.

Ultimately, *Strickland* requires more than a mere possibility that the proceedings would have come out a different way – it requires a "reasonable probability." *See Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008) ("This burden 'affirmatively [to] prove prejudice' requires Correll to show more than the mere possibility that counsel's performance prejudiced the outcome."). The state court could have reasonably concluded that there was no reasonable probability that Mr. Kraft's failure to advise Petitioner about the nature of the conflict and give him the opportunity to waive the conflict affected the outcome of the criminal proceedings. Accordingly, Plaintiff's first claim for habeas relief fails.

Finally, the Court notes that the authorities discussed above demonstrate that Mr. Kraft's decision to withdraw was well within the "range of competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687. Having discovered that he had been retained by individuals against whom Petitioner was seeking to provide information and evidence, Mr. Kraft could have reasonably determined that his ability to provide effective representation and advice to Petitioner was compromised. In these circumstances, the state habeas court could reasonably have concluded that Mr. Kraft provided reasonably effective representation.

For the foregoing reasons, Plaintiff's petition for habeas relief on this ground is **DENIED**.

B. Petitioner's Second Claim, Alleging Prosecutorial Misconduct, Is Barred by Petitioner's Subsequent Guilty Plea

Petitioner's second claim for relief alleges that "Christine McGuire, the Santa Cruz prosecutor, interfered with [his] Sixth Amendment right to counsel by forcing David Kraft, my retained lawyer, to withdraw from my case due to an allege[d] conflict of interest." Petition at 6. However, as discussed *supra*, a petitioner's guilty plea bars subsequent habeas claims for pre-plea constitutional violations that do not attack the knowing and voluntary nature of the guilty plea. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("As we explained in *Tollett v. Henderson*, a defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*."); *see also United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998) ("[B]y pleading guilty, Errol Cain waived arguments of prosecutorial misconduct . . . ."). Moreover, for the reasons discussed above, Petitioner has not established any such alleged violation by Ms. McGuire which led to Mr. Kraft's withdrawal resulted in any cognizable prejudice to Petitioner. Accordingly, Petitioner's prosecutorial misconduct claim is barred by his guilty plea, and his petition for habeas relief on this ground is **DENIED**.

C. Petitioner's Third Claim, Alleging Ineffective Assistance of Counsel, Fails to Meet the Deferential Standard Under AEDPA

Petitioner's third claim asserts that his second counsel, Lindy Hayes, provided ineffective assistance of counsel when she failed to challenge the inclusion of the Bothwell robbery in the February 1992 amended criminal complaint. Petitioner contends that he provided Santa Cruz investigators with information regarding this robbery in his immunity proffer and, therefore, he could not be prosecuted for the crime under his use immunity agreement. Petition, at 6; *see also* Traverse at 8 (stating that Lindy Hayes provided ineffective assistance "in failing to challenge the Bothwell burglary charge as a violation of the immunity agreement").

Respondent argues first that this claim is procedurally barred, and, alternatively, the state habeas court's rejection of this claim was not objectively unreasonable. In response, Petitioner contends that the state habeas court failed to address this claim and that an evidentiary hearing is

necessary to determine whether Petitioner provided information about the Bothwell burglary to authorities during his immunity proffer.

1. The State Court Adequately Addressed Plaintiff's Claim Against Ms. Hayes

Petitioner contends that the California Superior Court which considered his state habeas petition did not address – and therefore did not deny – the ineffective assistance of counsel claim. Rather, he argues that the transcript of the proceedings reveals that the state court only denied the *fourth* claim for relief, which asserted that his 1992 guilty plea was not knowing and voluntary. While Petitioner acknowledges the two claims are related, he contends that they are factually distinct. Specifically, he asserts that claim three "concerns Ms. Hayes' constitutionally deficient performance in failing to challenge the District Attorney's charging of the Gordon Bothwell residential burglary . . . as a violation of Petitioner's immunity agreement, through a motion to dismiss." Traverse at 8-9. Claim four, by contrast, "concerns Ms. Hayes' constitutionally deficient performance in failing to give Petitioner competent legal advice regarding the validity and scope of the immunity agreement and the merits of taking a plea agreement under which he surrendered his use immunity as to" the non-Bothwell burglary counts. *Id.* at 9.

Petitioner's argument that the state habeas court failed to address the third claim for relief is based on the fact that the Superior Court made reference to there being only *three* asserted claims for relief. For example, the court stated:

> THE COURT: . . . Counsel outlined the issue correctly. There were initially, upon the first filing of the petition, *three issues* that Mr. Grecu had raised. The Court denied the petition on two of those grounds. *There was a third ground that had not been dealt with,* as the Court ordered the district attorney's office, by way of OSC, to file a response.
>
> MR. DUDLEY [Mr. Grecu's attorney]: I thought there was actually four issues, and the Court had denied two and issued on two, but –

Petition, Ex. T, at 4-5 (Docket No. 1-21) (emphasis added). Petitioner thus contends that Respondent may not rely on the state habeas court's express findings because its findings were only directed toward the fourth claim for relief (regarding the voluntariness of Petitioner's guilty plea).

The Court rejects Petitioner's argument. While the Superior Court appeared to have conflated the third and fourth claims in a technical sense, a review of the record demonstrates that the court fully understood the claims being presented and made findings pertinent to both claims. Significantly, immediately after the above quoted language, Petitioner's counsel before the state habeas court agreed that the court had "phrased the issue" correctly:

> THE COURT: I believe that there were three and one remained, but the one that remains, I think, if there were – Count 2 was the matter which – of seven counts, and the sole issue here is whether the writ of habeas corpus should issue because of an ineffective assistance of counsel for not moving to dismiss Count 2, the Bothwell – B-o-t-h-w-e-l-l –
>
> MR. DUDLEY: Bothwell
>
> THE COURT: – burglary, residential burglary, which was Count 2 of 7. The defendant pled guilty to that, which may have been or may not have been covered in a use immunity agreement prior to the entry of the plea.
> So that's what this whole issue is around.
>
> MR. DUDLEY: This is correct.
>
> I think Ms. McGuire has always conceded that, with regard to the other burglary counts, they were always covered by the use immunity agreement.
>
> The issue was, was the –
>
> THE COURT: Count 2.
>
> MR. DUDLEY: – trial counsel ineffective for not realizing, as per the arguments of Mr. Grecu and myself, that – and it has been our position all along that Count 2, when properly analyzed . . . is covered by the use of the immunity agreement.
> So I think the Court has correctly phrased –
>
> THE COURT: Phrased the issue?
>
> MR. DUDLEY: – the issue; correct.

Id. at 6-7. This excerpt shows that the state court was entirely aware that the issue it was addressing was whether or not Ms. Hayes provided ineffective assistance in "not moving to dismiss Count 2" – the Bothwell burglary. It also demonstrates that Petitioner's counsel agreed with the Court's articulation of the issue presented and further suggests that Petitioner's counsel viewed claim 4 as

tied to, or derivative of, claim 3. This is further illustrated by Petitioner's second traverse before the state court, where Petitioner stated:

> Accordingly, contrary to the understanding of petitioner's trial counsel . . . that the Bothwell residential burglary incident was not covered by the use immunity given to petitioner . . . , and the obvious erroneous advise [sic] that attorney gave to petitioner on this point, petitioner entered pleas of guilty to the charges in issue that he would not otherwise have entered.

Lodged Exhibits, Ex. 10, at 13.

Accordingly, Petitioner described the key issue raised by the state habeas petition as whether or not Ms. Hayes provided ineffective assistance of counsel regarding the Bothwell robbery. Petitioner then argued Ms. Hayes' alleged deficient investigation and advice to Petitioner regarding the Bothwell robbery infected his guilty plea – rendering it not knowing and voluntary. Given the entirety of the transcript, and the clear focus of Petitioner's habeas petition and traverse, there is no merit to Petitioner's contention that the state habeas court failed to address his third claim for relief.[3] The Court further notes that the critical issues were common to *both* the third and fourth claims for relief: whether the Bothwell robbery was included in the immunity agreement and Ms. Hayes' performance regarding this issue.

2. Petitioner's Claim for Ineffective Assistance of Counsel Is Procedurally Barred

Respondent argues that Petitioner's claim for ineffective assistance of counsel is procedurally barred insofar as the state habeas court found that petitioner had unreasonably delayed in presenting it. After rejecting the merits of Petitioner's ineffective assistance claim, the Superior Court stated:

> The Court also feels that, under the *Clark* case, at 5 Cal. 4th 750, it establishes a responsibility on the petitioner to act within a

[3] Further, even if the Court were, as Petitioner urges, to find that the state court failed to consider Petitioner's ineffective assistance claim (or, alternatively, that it failed to address the knowing and voluntary plea claim), this would not aid Petitioner. Petitioner would still be required to show there was no reasonable basis for the state court to deny relief, and the Court would have been required to determine "what arguments or theories . . . could have supported[] the state court's decision." *Harrington*, 131 S. Ct. at 784, 786; *see also Amado v. Gonzalez*, — F.3d — , 2014 WL 3377340, at *8 (9th Cir. July 11, 2014) (noting that where a "state-court opinion addresses some but not all of a defendant's claims, federal habeas courts should presume, as *Harrington* requires, that the state court opinion adjudicated the federal claims . . . on the merits").

> reasonable period of time, and there have been delays in this case for various reasons.
>
> However, the Court feels that there has been an unreasonable amount of time that has passed in this case prior to the petitioner raising his claim, including his appeal to the Sixth District Court of Appeal, and in *Clark* it states, " . . . in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."

Petition, Ex. T, at 14. The Respondent contends this alternative holding finding a procedural bar represents an independent and adequate state law ground supporting the state court's determination, therefore precluding federal habeas review.

"A claim in a federal habeas petition may be procedurally defaulted if it was actually raised in state court but found to be defaulted on an adequate and independent state procedural ground." *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012). This rule applies even where the state court reached the merits of the claim even after finding the claim procedurally barred. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 265 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition the adequate and independent state ground doctrine requires the federal court to honor a state holding that is sufficient basis for the state court's judgment even when the state also relies on federal law."); *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003) ("Although the California Supreme Court denied Bennett's state habeas petition both on the merits as well as for lack of diligence, and thus considered the merits of Bennett's claim, we must nevertheless examine whether denial for lack of diligence rested on an independent and adequate state procedural ground. If so, Bennett is procedurally barred from pursuing his claims in federal court.").

Of course, a prerequisite for this rule to apply is a finding that the petitioner did, in fact, procedurally default before the state court. Federal courts will largely respect the judgments by state courts that a petitioner has procedurally defaulted, just as they would any state court determination of state law. *See Lopez v. Schriro*, 491 F.3d 1029, 1043 (9th Cir. 2007). At the same time, however, "'[t]he procedural default doctrine self-evidently is limited to cases in which a 'default' actually occurred *i.e.*, cases in which the prisoner actually violated the applicable state procedural rule.' . . .

[A]n erroneously applied procedural rule does not bar federal habeas review." *Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011) (quoting 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2[c] (6th ed. 2011)). A federal court may reject a state court's finding of procedural default where "the state court's interpretation is 'clearly untenable and amounts to a subterfuge to avoid federal review of a deprivation by the state of rights guaranteed by the Constitution.'" *Lopez*, 491 F.3d at 1043 (quoting *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir. 1982)). Where a petitioner did, in fact, procedurally default before the state court, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Rivera v. Hedgpeth*, No. C12-03078 BLF (PR), 2014 WL 4184803, at *7 (N.D. Cal. Aug. 22, 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

As quoted above, the state habeas court found that Petitioner had unreasonably delayed in articulating his ineffective assistance of counsel claim, relying on the California Supreme Court's decision in *In re Clark*, 5 Cal. 4th 750 (1993). As this Court has previously noted, "*Clark* reiterates several procedural rules governing petitions for writs of habeas corpus." *Grecu v. Evans*, No. C07-780, 2012 WL 4643871, at *5 (N.D. Cal. Oct. 1, 2012). One such procedural rule is the requirement that a "petitioner explain and justify any significant delay in seeking habeas corpus relief." *Id.* (quoting *Clark*, 5 Cal. 4th at 761). Unlike most states, California applies a "general 'reasonableness standard' to judge whether a habeas petition is timely filed." *Walker v. Martin*, 131 S. Ct. 1120, 1225 (2011). "The basic instruction provided by the California Supreme Court is simply that 'a [habeas] petition should be filed as promptly as the circumstances allow . . . .'" *Id.* (quoting *In re Clark*, 5 Cal. 4th at 765 n.5). Accordingly, an untimely petition – one characterized by an unreasonable, unexplained delay in filing – will be procedurally barred. A second procedural rule discussed in *Clark* states that "issues resolved on appeal will not be reconsidered on habeas corpus, and . . . the writ will not lie where the claimed errors could have been, but were not, raised upon a

timely appeal from a judgment of conviction." *Clark*, 5 Cal. 4th at 765.[4] "Without this usual limitation on the use of the writ, judgments of conviction of crime would have only a semblance of finality." *Id.* at 765-66.

These procedural rules referenced in *Clark* have been found to be adequate and independent state procedural grounds, the invocation of which bars federal habeas review of the claim in question. *See, e.g.*, *Walker*, 131 S.Ct. at 1125, 1128-29; *Ashford v. Beard*, No. 2:11-cv-01423-JKS, 2014 WL 2876758, at *6 (E.D. Cal. June 24, 2014) ("The Ninth Circuit has held that California's 'substantial delay' timeliness standard satisfied the 'independent and adequate' requirement."); *Barnett v. Knowles*, No. C-08-1604-RMW, 2013 WL 3815642, at *2 (N.D. Cal. July 22, 2013) ("California's 'substantial delay' timeliness standard satisfies the 'independent and adequate' requirement.").

In its prior order denying Respondent's motion to dismiss the petition, the Court construed the Superior Court's citation to *Clark as* "address[ing] the timeliness of Petitioner's particular claim of ineffective assistance of counsel on direct appeal, not the timeliness of the petition itself." *Grecu v. Evans*, 2012 WL 4643871, at *5. Thus, this Court concluded that Superior Court had applied the second *Clark* procedural rule and found that Petitioner had "fail[ed] to timely appeal Petitioner's ineffective assistance of counsel claim." *Id.* This construction of the Superior Court's order – were it to stand – would be fatal to Respondent's procedural bar argument. The California Supreme Court has held that the procedural rule prohibiting a habeas petitioner from raising claims that were not raised on direct appeal (more commonly referred to as the *Dixon* bar) does not apply to ineffective assistance of counsel claims. Specifically, in *In re Robbins*, 18 Cal. 4th 770 (1998), the Supreme Court stated:

> We apply the bars of *In re Dixon* and *In re Waltreus* whenever it appears that either bar is applicable, with one exception. We do not apply those bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record.

[4] This procedural rule is commonly invoked by California courts with citation to *In re Dixon*, 41 Cal. 2d 756, 759 (1953).

Id. at 814 n.34. Accordingly, district courts have refused to find ineffective assistance claims to be procedurally barred for failure to raise on direct appeal under *Dixon*. *See, e.g.*, *Johnson v. Giurbino*, No. 1:03-cv-06013-LJO-TAG HC, 2007 WL 2481789, at *11 n.2 (E.D. Cal. Aug. 29, 2007).

However, in re-reviewing the record in this action and, specifically, the Superior Court's oral ruling, this Court concludes that the Superior Court applied *both* of the procedural rules articulated in *Clark* – including unreasonable delay in presenting state habeas claims, not just the *Dixon* bar. First, the Court notes that it would have been anomalous for the Superior Court (in 2005) to fault Petitioner for failing to raise his ineffective assistance claim on direct appeal when, seven years previously, the California Supreme Court in *Robbins* found such a failure does not bar habeas relief. Second, the Superior Court noted the failure to raise the ineffective assistance claim on direct appeal as only an *example* of the "unreasonable amount of time" that had "passed in this case prior to the petitioner raising his claim." Petition, Ex. T, at 14. The Court found an unreasonable time had passed "including" his direct appeal. *Id.*

The Superior Court could reasonably have determined Petitioner unreasonably delayed by failing to raise his ineffective assistance of counsel claim during the five years Petitioner was enjoying the benefits of his plea bargain while on probation. *Cf. People v. Superior Court*, 210 Cal. App. 3d 1146 (1989) ("[W]e hold that defendant waived the defect in his 1983 [not guilty by reason of insanity] plea by his unexcused delay in challenging that plea until he reaped the full benefit of hospital confinement and avoided the possibility of prison and attendant parole period."); *see also In re Douglas*, 200 Cal. App. 4th 236, 247 (2011) ("[D]ecisional law has expanded the scope of the writ [of habeas corpus] to apply to those in constructive custody situations and today may apply to those on . . . probation . . . ."). Alternatively, the Superior Court could also reasonably have found that Petitioner unreasonably delayed by waiting approximately a year after his 1999 revocation conviction became final to pursue his state habeas petition when Plaintiff had long been aware of all facts necessary to pursue his ineffective assistance claim. Either way, the Superior Court's finding of unreasonable delay was not "clearly untenable." *Lopez*, 491 F.3d at 1043.

Accordingly, the Superior Court relied on an independent and adequate state law ground in denying Plaintiff's third claim for relief. On this basis, the Court concludes that Plaintiff's third

claim for relief, alleging that Ms. Hayes provided ineffective assistance of counsel, is procedurally barred. However, as discussed below, even if there were no procedural bar, Petitioner's third claim of relief nonetheless fails on the merits.

3. The State Court's Rejection of Petitioner's Ineffective Assistance Claim Was Not Objectively Unreasonable

In rejecting Petitioner's third claim of relief on the merits, the Superior Court found that Ms. Hayes was "reasonably effective." Petition, Ex. T, at 11. It noted that Petitioner "appeared to have been aware of the fact that the Bothwell burglary may not have been covered in the use agreement" and that Petitioner had taken additional time to "consider the disposition and confer with his attorney." *Id.* at 12. Ultimately, it noted that "[i]t is obvious from the record that the decision to enter plea [sic] or not was a thoughtful decision . . . based on a tactical decision to avoid a state prison commitment." *Id.*

However, Petitioner claims that the state court erred because Ms. Hayes failed to conduct any investigation into whether the Bothwell burglary had been previously disclosed to law enforcement authorities. He further contends that had such an investigation been done, Ms. Hayes would have discovered that law enforcement had no evidence tying Petitioner to the Bothwell burglary independent of information he had given during his immunity proffer. He also argues he is entitled to an evidentiary hearing on the question of what, precisely, Petitioner told law enforcement regarding the Bothwell burglary.

The Court begins with Petitioner's request for an evidentiary hearing. A district court's ability to conduct an evidentiary hearing was severely cabined by the Supreme Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *See, e.g.*, *Hill v. Sheldon*, No. 1:11CV2603, 2014 WL 700024, at *19 (N.D. Ohio Feb. 21, 2014) (noting that *Pinholster* "greatly limits the circumstances where any federal evidentiary hearing would be warranted"); *Quezada v. Scribner*, No. C04-7532-RSWL (MLG), 2011 WL 3652245 (C.D. Cal. Aug. 19, 2011) ("*Pinholster*'s limitation on evidentiary hearings has consequences for discovery in habeas cases."). In *Pinholster*, the Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398. The Court noted that it would

"be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* at 1399.[5] Accordingly, after *Pinholster*,

> for claims that were adjudicated on the merits in the state court, petitioners can rely only on the record before the state court in order to satisfy the requirements of § 2254(d). This effectively precludes federal evidentiary hearings for such claims because the evidence adduced during habeas proceedings in federal court could not be considered in evaluating whether the claim meets the requirements of § 2254(d).

Gulbrandson v. Ryan, 738 F.3d 976, 993-94 (9th Cir. 2014) (citation omitted); *see also Martin v. Allison*, No. 2:11-cv-0870 LKK GGH (HC), 2014 WL 3058442 (E.D. Cal. July 3, 2014) ("[E]videntiary hearings are not granted unless it can be determined from the existing record that the California courts acted AEDPA unreasonably in arriving at the determination on a legal or mixed fact/legal issue . . . .").

An evidentiary hearing may be appropriate after *Pinholster* only if the district court first determines that the state court made an unreasonable application of federal law or made an unreasonable determination of facts based on the record before it. *If* the state court did this (that is, if the state court's decision fails AEDPA's deferential standard of review), an evidentiary hearing may be conducted to determine whether Petitioner has demonstrated a constitutional violation (without giving any deference at that point to the state court decision). *See Pinholster*, 131 S.Ct. at 1411 n. 20 ("Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision 'contrary to' or 'involv[ing] an unreasonable application' of federal law, a writ of habeas corpus 'shall not be granted' and our analysis is at an end." (quoting 28 U.S.C. § 2254(d))). There may be an exception to *Pinholster* where the state court did not reject Petitioner's claims on the merits, but instead relied upon a state procedural bar that is either not independent or adequate or otherwise was excused. *See, e.g., Quezada v. Scribner*, No. CV 04-7532-RSWL (MLG), 2011 WL 3652245 (C.D. Cal. Aug. 19, 2011) ("[I]f [petitioner] can

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[5] Similarly, by its express terms, review under § 2254(d)(2) is also limited to the record before the state court. *See* 28 U.S.C. § 2254(d)(2) (state court decision reviewed to determine if it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

show cause and prejudice for the procedural default, *Pinholster* would not be applicable to this petition because the *Brady* claim was not addressed on the merits by the state courts."). But where, as here, the state court reached the merits, *Pinholster* does not permit an evidentiary hearing absent the showing discussed above. *See Gulbrandson*, 738 F.3d at 993 ("Thus, for claims that were adjudicated on the merits in state court, petitioners can rely only on the record before the state court in order to satisfy the requirements of § 2254(d).").

For the reasons stated below, Petitioner is not entitled to an evidentiary hearing insofar as the state court's determination that Ms. Hayes provided reasonably effective representation (and that the decision to plead guilty was the result of an informed tactical decision) was not objectively unreasonable.

The Court has already discussed above the *Strickland* standard that governs this ineffective assistance inquiry. Plaintiffs third claim for relief, however, arises in the context of a plea agreement. The Supreme Court has noted that:

> Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger. The State's case can begin to fall apart as stories change, witnesses become unavailable, and new suspects are identified.

Premo v. Moore, 131 S.Ct. 733, 741 (2011). Because of this, "strict adherence to the *Strickland* standard [is] all the more essential when reviewing the choices an attorney made at the plea bargain stage." *Id.* Failure to provide proper deference to counsel's determinations at this stage risks the "potential for the distortions and imbalance that can inhere in a hindsight perspective." *Id.* Because the information available to counsel at the pretrial stage is limited, "[i]n determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel." *Id.*

Petitioner contends that Ms. Hayes' conduct prior to the plea agreement was deficient insofar as she failed to investigate the scope of his use immunity agreement. Specifically, he contends that issue raised in his third claim for relief is "*not* the reasonableness of Ms. Hayes' tactical decision not to challenge the Bothwell burglary charge . . . . Rather, it is whether Ms. Hayes' apparent failure to investigate adequately the circumstances under which the Santa Cruz County law enforcement authorities learned of Petitioner's involvement in the Bothwell burglary . . . was itself reasonable." Traverse at 26. Petitioner relies primarily on *Wiggins v. Smith*, 539 U.S. 510 (2003), where the Court reiterated that the deference owed to counsel's strategic judgments depended on the "adequacy of the investigations supporting those judgments." *Id.* at 521. Thus, "'[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations.'" *Id.* at 521 (quoting *Strickland*, 466 U.S. at 688). However, even counsel's decision *not* to investigate "'must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Id.* at 521-22 (quoting *Strickland*, 466 U.S. at 690-91). This is ultimately a context-dependent consideration of the challenged conduct "'as seen from counsel's perspective at the time.'" *Id.* at 523 (quoting *Strickland*, 466 U.S. at 689).

a. The State Court's Determination that Ms. Hayes Provided Reasonably Effective Counsel Was Not Objectively Unreasonable

The state court's determination that Ms. Hayes was reasonably effective was not contrary to, or an unreasonable application of, federal law. Nor was it an based on an unreasonable determination of the facts in light of the record before the state court. *See Gonzales v. Adams*, No. CV 09-586-DSF (SP), 2012 WL 1032977 (C.D. Cal. Mar. 8, 2012) ("[T]he state court's finding that trial counsel's performance fell within the range of reasonable professional assistance is not an unreasonable application of clearly established federal law or an unreasonable determination of the facts.").

Petitioner asserts that Ms. Hayes "simply accepted Christine McGuire's assertion that the Bothwell burglary had not been disclosed by Petitioner." Traverse at 26. However, the record

demonstrates that Ms. Hayes was present during his December immunity proffer with the Santa Cruz authorities. *See* Petition Ex. B, at 17 (transcript of December immunity proffer with Ms. Hayes providing Petitioner guidance regarding the scope of the immunity agreement). Further, Ms. Hayes in her declaration speaks of accompanying Petitioner and law enforcement officials over a three day span in December as he spoke of various crimes in which he had been involved. Petition, Ex. Q, at 3. Accordingly, it appears that Ms. Hayes had knowledge of what Petitioner had disclosed as part of his immunity agreement with Santa Cruz officials in December. Significantly, Petitioner's second traverse before the Superior Court, drafted by an attorney, concedes that the transcript of the December proffer contained "no direct mention of the residential burglary committed at the Bothwell residence." Lodged Exhibits, Ex. 10, at 4.[6] Accordingly, the record demonstrates that Ms. Hayes did not simply "accept" the prosecutor's assertion that the Bothwell burglary had not been disclosed, but rather had first hand knowledge of the nature and detail of Petitioner's December proffer – a proffer that Petitioner conceded contained "no direct mention" of the Bothwell residence.

Petitioner asserts, however, that he disclosed the Bothwell robbery to Santa Cruz authorities during a *November* proffer when his previous attorney, Mr. Kraft, had negotiated a verbal use immunity agreement. *See* Petition, Grecu Decl. ¶ 38 ("The Bothwell burglary I had fully disclosed to Santa Cruz authorities on November 22 & 25, and again on December 9 &10 . . . ."). However, Petitioner's attempt to base his ineffective assistance claim on Ms. Hayes' failure to investigate whether Petitioner had disclosed the Bothwell burglary in November is problematic. To begin, Petitioner failed to establish a clear record to support this claim. What can be said with confidence is that on November 22, 1991, Petitioner was accompanied by Santa Cruz County law enforcement on a "drive around" after Petitioner had begun disclosing Santa Cruz crimes to Santa Clara authorities as part of his agreement with Santa Clara County. It is also evident that he was told during this drive that his agreement with Santa Clara "was not binding with the Santa Cruz Sheriff's Office and that anything he told to us would be in the form of a proffer." Petitioner was further told

[6] To the extent that Petitioner has asserted that the transcript of the December immunity proffer has unexplained gaps in pages, the record reveals no objection by Petitioner, or his counsel, to the completeness of the transcript before the Santa Cruz County Superior Court.

that anything he told law enforcement that day "would not be used against him because he was represented by an attorney." It is also clear that Petitioner *now* contends that three days later, a verbal immunity agreement was entered into with Santa Cruz County and he spent "numerous hours reciting all of the cases I had previously disclosed to Santa Cruz investigators on November 22, 1991." *Id.*

Petitioner's current account, however, is inconsistent with what was placed before the Superior Court. In his initial declaration in support of his state habeas petition, Petitioner spoke of a single immunity proffer (without differentiating his alleged November proffer and his December proffer). He did not state that this proffer occurred during a "drive along" with law enforcement, but rather was "made during a tape-recorded conversation" in which he spent "numerous hours over several days cataloging the crimes [he] knew about." Lodged Exhibits, Ex. 6, Grecu Decl. ¶ 9. Petitioner claimed in this declaration that it was *after* his formal immunity proffer that he accompanied law enforcement officers and showed them various crime scenes. *Id.* ¶ 10. Further, the record suggests that in his state court petition, Petitioner was referencing the December proffer. In his declaration in support of this petition, Petitioner, referencing an attached exhibit, states that "Santa Cruz authorities later produced a transcript of these tapes which is several hundred pages long." *Id.* This is significant because the only transcripts which appear in the state court record are of the *December 9* proffer. Further, Petitioner has stated in his declaration before *this* Court that he has never received the tapes or a transcript of the November 25 immunity agreement and proffer. Grecu Decl. ¶ 15. Accordingly, insofar as the Superior Court petition refers to a single immunity proffer for which hundreds of pages of transcripts were produced, it must have been referring to the December proffer.

It was not until Petitioner filed his *pro se* "Denial and Exception to the Return" that he asserted that a formal immunity proffer was made with Santa Cruz authorities in November. Lodged Exhibits, Ex. 9, at 2-3. Ultimately, however, in the Traverse to Return to Writ of Habeas Corpus that Petitioner filed (through counsel), there are no references to a November proffer of any kind. Instead, the only reference Petitioner giving a proffer are the following paragraphs:

> 10. On December 9 and 10, 1991, petitioner gave the authorities, including authorities from the Santa Cruz County Sheriff's Office, a lengthy statement of armed residential robberies and residential burglaries occurring in Santa Clara, Monterey and Santa Cruz Counties from 1987 to 1991. This statement included approximately six armed residential robberies; and nine residential burglaries, occurring in Santa Cruz County. The individuals perpetrating those crimes, according to petitioner, were, among other individuals, petitioner himself, David Ianniciello, Robert Ianniciello, John Hyman, Joe Hyman, and Ronald Santa Cruz. . . .
>
> 11. With regard to the statements petitioner provided to the authorities on December 9 and 10, 1991, petitioner received use immunity as reflected in a transcribed statement . . . .

Id. at 3. Further, as quoted above, Petitioner, through his attorney, conceded that there was "no direct mention of the residential burglary committed at the Bothwell residence" during the December 9 and 10 proffer. Id.

As the above account indicates, Petitioner failed to place into the Superior Court record any clear account of when he made his formal immunity proffer, let alone what was contained in that proffer. In opposition to Petitioner's apparently fluid account, the record contains a number of references to the December proffer being the formal proffer on which the use immunity agreement was predicated. For example, Petitioner placed into the state court record (as Exhibit 12 to his Denial and Exception to Return), a report by Detective Len Lofano of the Santa Cruz Sheriff's Office which included the following account of the post-November 22 events:

> During the following week [after the November 22 drive] I put D.A. McGuire in touch with [Petitioner's] Attorney. They agreed to meet in Santa Cruz, along with [Petitioner], and strike a "proffer agreement." The parties met but [Petitioner's] attorney was not prepared at the time to strike an agreement. All parties involved met at the Santa Clara DAO at a later date but were informed by [Petitioner's] attorney that he had a conflict in the case and had to bow out as [Petitioner's] attorney.
>
> On 12-9-91 McGuire, Bradley, Santa Clara D.A., Sgt. Keech, myself, and [Petitioner's] new Attorney, Public Defender Lindy Hayes, met and discussed the situation. Hayes agreed to [Petitioner] making a proffer. McGuire made the proffer statement on tape . . . which Hayes agreed to.

Similarly, Ms. Hayes' stated that she when she was first retained (in December), she was informed that "David Grecu was talking about crimes outside of the Santa Clara County jurisdiction, that

Santa Clara could not bind other jurisdictions by their sentencing agreement on a single felony case, and that the police would like to find out just what he was talking about before they would commit themselves to any firm agreement." Petition, Ex. Q, at 1. In a subsequent meeting, she stated that Santa Cruz authorities informed Petitioner that he would have "use immunity for anything that he admitted to" and "would not go to prison for anything that he told them about, but that they could prosecute him for anything that they found about independently." *Id.* at 2. She asserts that David "said he understood, and talked non-stop for the next three days." *Id.*

In summary, Petitioner failed to clearly articulate before the state court that a formal immunity proffer occurred in November 1991, prior to the retention of Ms. Hayes. Rather, the record reflects that the only consistent references to an immunity proffer in the Superior Court record are to the December proffer. Petitioner's assertion of a November immunity agreement is not corroborated by any documents or evidence, and as noted above, his own description of the alleged agreement lacks any detail as to who offered the immunity and its scope and terms. Given Petitioner's failure to establish a record on this point, the Superior Court could have reasonably concluded that Ms. Hayes did not render ineffective assistance for failing to investigate whether Petitioner had previously disclosed the Bothwell prior to her retention; there may have been nothing to investigate.

Further, even if it is assumed that an immunity proffer occurred in November, there is nothing in the state court record indicating that Petitioner *expressly told* Ms. Hayes that he disclosed the Bothwell robbery during a proffer in November. Rather, his declaration attached to the state habeas petition states that he initially refused to plead because he had "complete immunity under the agreement." *Id.* ¶ 19. Petitioner's general protestation of "complete immunity," however, is quite different from him advising his counsel of when and in what circumstances he was claiming to have disclosed the burglary. *Cf. Jimenez v. Walker*, No. C08-05489 YGR (PR), 2014 WL 4051124, at *22 (N.D. Cal. Sept. 13, 2012) ("The failure to investigate a defense may not be ineffective assistance where it was due to the defendant's failure to inform the attorney of relevant facts."). Petitioner's apparent failure to provide Ms. Hayes with such information is particularly glaring given that the record before the state court revealed that Ms. Hayes had sat through Petitioner's lengthy proffer in

December. As Petitioner had every incentive to fully disclose in December what he had allegedly disclosed in November, his silence would not have led Ms. Hayes to believe there had been an earlier immunity proffer which differed in a material way from the December immunity.

Finally, even if Ms. Hayes had reason to believe there had been an earlier proffer protected by an immunity agreement, the record provides a reasonable basis for the Superior Court to have concluded that any failure to fully investigate whether Petitioner had disclosed the Bothwell robbery was the result of a tactical decision that did not fall below the *Strickland* standard. First, Ms. Hayes indicated in her declaration before the Superior Court that at the time the Santa Cruz County District Attorney filed its charges, there was a "very real problem of the police finding independent means" to prosecute other crimes that Petitioner had referenced in his use proffer. She provided the following example:

> In Monterey, for example, there was a residential robbery which David had told the police about. The homeowner had been beaten while tied up in front of his two small children. The crime had gone unsolved at the time, but the police had recovered a footprint outside one of the windows which turned out coincidentally to match David's shoe. The police were in the process of preparing photo lineups to show to the homeowner when the Chief Assistant DA of Monterey County, a former classmate of mine, agreed to halt investigation in return for David's cooperation with Santa Cruz. I wondered just how far the use immunity would protect David – If the homeowner did recognize photos, would that be the fruit of the poisoned tree or would it be sufficiently independent to stand on its own as evidence?

Id. at 4. The record reveals Ms. Hayes had a justifiable concern whether law enforcement eventually would be able to tie Petitioner to his crimes independent the use immunity. Second, Petitioner admits to being extremely motivated to avoid a prison term out of a fear for his safety, and Ms. Hayes was well aware of his fear. *See* Lodged Exhibits, Ex. 6, at 5-6 ("[Ms. Hayes] told me to cooperate and go along with a new deal because otherwise I would end up in prison with the people I had turned in. I was very frightened about that prospect because Sgt. Bradley had said the Ianniciello family had a $100,000 contract on my life."); Petition, Grecu Decl. ¶ 47 ("I only plead guilty because Ms. Hayes said that my past agreement was worthless. I was under a very real death threat; I had no other option to avoid being put in a lethal situation."). Indeed, Ms. Hayes refers to

Petitioner as being "frantic about not going to prison" once the charges were brought against him because of the "danger to him in custody." Petition, Ex. Q, at 3.

Courts have recognized that the failure to conduct further investigations into a given defense or claim is not *per se* ineffective assistance. Rather, as the *Wiggins* court itself recognized, the critical inquiry is whether the decision not to investigate was the result of "reasonable professional judgments." *Wiggins*, 539 U.S. at 521. *See, e.g.*, *Torres v. Prosper*, No. CIV S-07-1689 LKK CHS P, 2010 WL 1338145, at *27 (E.D. Cal. Apr. 2, 2010) ("Faced with what appeared to be a very strong case for the State, combined with the potential that Torres could incur a sentence in excess of 30 years with multiple strikes if found guilty at trial, White's decision to forego additional investigation in favor of pursuing a global plea agreement acceptable to his client was perfectly reasonable and fell within the wide range of professional assistance available."); *United States v. West*, 312 F. Supp. 2d 605, 612 (D. Del. 2004) (finding decision to forgo further investigation and to advise client to plead guilty was reasonable given the strength of the government's case and the fact that sentencing reduction defendant would receive by pleading guilty). In light of the risk that law enforcement would be able to tie Petitioner to additional crimes independent of the immunity proffer and Petitioner's fear of prison, the state court's determination that Ms. Hayes provided reasonably effective counsel in advising Petitioner to accept a plea that allowed him to avoid prison time was not objectively unreasonable.

b. <u>The State Court Could Reasonably Have Found that Petitioner Suffered No Prejudice</u>

Additionally, even if Petitioner had established that the state court's determination as to Ms. Hayes' effectiveness was objectively unreasonable, his claim for relief would still fail as he has not demonstrated prejudice. In guilty plea cases, the *Strickland* prejudice standard is slightly modified and requires Petitioner to show a "'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Premo*, 131 S. Ct. at 745 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Here, if Ms. Hayes had conducted the thorough investigation Petitioner claims she was constitutionally required to perform and found the evidence that he contends demonstrates that the Bothwell burglary was covered by the use immunity

agreement, he would have had, at most, an argument that the burglary count should be dismissed. It is unclear whether such an argument would have been successful.

Specifically, the Superior Court could reasonably have concluded that there was independent evidence upon which the district attorney would have relied in pressing the Bothwell burglary charge against Petitioner. For example, on January 3, 1992, Henry Hyman, the father of one of Petitioner's criminal associates, contacted the district attorneys' office and requested that the police come and search his home for any stolen firearms or property that their son may have been keeping at the house so that he could "clear his conscience." Petition, Ex. M (Docket No. 1-14), at 4. Mr. Hyman told the searching officers that his son and his son's friend Dave – the Petitioner – frequently came by the house and had left a number of guns there. One of the guns that was located on the premises was a pistol that had been stolen from the Bothwell home. *Id.* at 4-5. Accordingly, law enforcement had a way to connect Petitioner to a stolen firearm from the Bothwell residence.

Petitioner responds that this is "fruit" of Petitioner's proffer because during this proffer, he went into length about how he would hide stolen property at his friend's house. Traverse at 22. Thus, he claims, "[a]cting on Petitioner's statements, they sooner or later would have served a search warrant on the Hymans' house, and they would have recovered the pistol." *Id.* at 24. That law enforcement *could* have eventually located the pistol based on Petitioner's statements does not change the fact that Mr. Hyman contacted law enforcement on his own volition and provided law enforcement with an independent path to that pistol – and a means to tie Petitioner to the burglary.

In addition, as a result of locating this pistol and the information provided by Mr. Hyman, law enforcement re-interviewed a witness who further connected Petitioner to the crime. The witness was a police officer who had detained an individual near the Bothwell residence while responding to the robbery call. Petition, Ex. M, at 6. The individual informed the officer that his name was Patrick David Thompson and was dressed in a camouflage field jacket. *Id.*[7] The officer

[7] The party who had reported the Bothwell robbery and got a glimpse of the robber initially told law enforcement that the robber was wearing a "khaki field jacket," but, when he was re-interviewed following the discovery of the pistol at the Hyman residence, stated that he had "later realized it was camoflage [sic]." *Id.* During the re-interview of the reporting party, he was shown a photo lineup that included Petitioner's photo in it. While the reporting party did not identify Petitioner's picture, the police report of the interview asserts that the photo that was selected

patted the individual down and found old coins, a jewelry box, and .30 06 ammunition rounds. *Id.* The individual gave a plausible explanation for having these items and, given the officer's hurry to arrive at the residence, he let the individual go. The officer later learned the items had been stolen from the Bothwell robbery. *Id.* When this officer was re-interviewed, he was shown a photo lineup that included Petitioner's picture, and the officer "picked out Grecu as the subject he had contacted in the area and time of the burglary." *Id.* at 5.

Petitioner has arguments as to why the identifications by the officer and reporting party are unreliable. He asserts further arguments as to why Mr. Hymans' call to law enforcement should not be deemed "independent" of his immunity proffer – specifically that (1) Mr. Hyman only called law enforcement because his sons were arrested, which only happened because of Petitioner's testimony and (2) that the searching officers' conduct during the search was influenced by the information they had received during the proffer. Petition, Grecu Decl. ¶ 29. The success of these arguments turned on the ability of Petitioner to convince a trial court to make specific credibility determinations and to find that this evidence was, in effect, "fruit of the poisonous" tree (*i.e.*, in violation of the immunity agreement), despite Mr. Hyman's volitional, uncoerced decision to contact law enforcement. The Superior Court could reasonably have concluded Petitioner's asserted causation was too attenuated.

Furthermore, if Petitioner had rejected the plea agreement and instead chosen to defend the Bothwell burglary charge, and had his immunity defense failed, he would have been facing a potentially significant prison term for first degree burglary – a prison term that the record demonstrates he was "frantic" to avoid. In light of this uncertainty and his desire to avoid prison, it appears highly unlikely that Petitioner would have taken such a gamble – particularly in light of a plea offer and a sentence consisting primarily of probation that the sentencing court reasonably characterized as a "simply a gift." Lodged Exhibits, Ex. 2, at 511.

On these facts, the state court could reasonably have concluded that there was no "reasonable probability" that but for Ms. Hayes' allegedly deficient performance Petitioner's decision to plead guilty would have been different.

"resemble[d]" Petitioner. *Id.*

c. Conclusion

As stated above, *Strickland* requires a petitioner alleging ineffective assistance to demonstrate both objectively unreasonable conduct by counsel and prejudice. *See Gulbrandson*, 738 F.3d at 988. The Superior Court's determination that Ms. Hayes provided reasonably effective assistance to Petitioner was not objectively unreasonable. Further, the Superior Court could have reasonably found that petitioner suffered no prejudice for the reasons stated above *See Premo*, 131 S. Ct. at 745 (articulating the prejudice prong in the guilty plea context as whether there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). For the foregoing reasons, Petitioner's third claim for relief is **DENIED**.

D. As Plaintiff Concedes, His Fourth Claim for Relief Alleging that his Guilty Plea Was Not Knowing and Voluntary Is Procedurally Barred

Petitioner's final claim for habeas relief is that his guilty plea in the underlying state criminal proceeding was not knowing or voluntary. Petitioner bases this claim on the fact that he "plead guilty only on the advi[c]e of my lawyer and she falsely or mistakenly told me my immunity agreement was worthless and could not prevent the prosecution of the charges." Petition at 6. As already discussed, this claim is related to his claim of ineffective assistance. Further, as discussed above, the state habeas court applied the *Clark*/*Dixon* procedural bar prohibiting raising claims which could have, but were not, brought on direct appeal in habeas proceedings to these claims. Petitioner concedes that he is procedurally barred from proceeding with this claim. *See* Traverse at 28 ("Third, Judge Morse's denial of Claim Four based on an independent state-law ground under *Clark*, while erroneous from Petitioner's point of view, would foreclose federal court review of Claim Four under AEDPA.").

Further, even if the Court were to reach the merit of this claim, the state court's determination that Petitioner's guilty plea was a strategic decision to avoid a prison sentence was not objectively unreasonable. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52 (1985) (holding that a "defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent

character of the guilty plea by showing that the advice he received from counsel" was not "within the range of competence demanded of attorneys in criminal cases").

V. CONCLUSION

Accordingly, Petitioner's fourth claim for relief is **DENIED**. The Clerk shall enter Judgment in favor of Respondent and close the file in this case.

IT IS SO ORDERED.

Dated: October 22, 2014

EDWARD M. CHEN
United States District Judge